DECLARATION OF RONALD B. YOKUBAITIS ISO MOTION TO DISMISS

11cv0905h

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- 3. Attached as Exhibit C to this declaration is a true and correct copy of a letter, dated April 7, 2009, that I, as Giganews' designated agent under Section 512(c) of the Copyright Act, sent to Norm Zada of Perfect 10, Inc.
- 4. Attached as Exhibit D to this declaration is a true and correct copy of the email, dated August 11, 2010, that Giganews received from Norm Zada of Perfect 10, Inc.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 22th day of June, 2011, in Austin, Texas.

RONALD B. YOKUBAITIS

TABLE OF EXHIBITS TO THE DECLARATION OF RONALD B. YOKUBAITIS IN SUPPORT OF DEFENDANTS' RULE 12(b)(6) MOTION TO DISMISS

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EXHIBIT A

March 25, 2009

RECEIVED MAR 2 6 2009

To Whomever It May Concern,

Your company is stealing and selling massive quantities of not only our copyrighted materials but the copyrighted materials of most copyright holders.

Attached please find a DVD which contains a sampling of our copyrighted materials that your site has offered for sale without any authorization whatsoever. Please remove all copyrighted materials that you do not have the rights for from your offerings, including the materials on the attached DVD. We and other copyright holders cannot compete with a company like yours that is stealing massive quantities of other people's property as you have no cost to acquire your stolen materials whereas we pay to create what we own.

I swear under penalty of perjury that a) I have a good faith belief that the use of the Perfect 10 copyrighted material in the manner complained of in this email is not authorized by the copyright holder Perfect 10, its agent, or the law, b) that the information in this notification is accurate, to the best of my knowledge, and c) that I am authorized to act on behalf of Perfect 10, Inc. the owner of the exclusive rights in the material which is being infringed.

Please contact me if you have any questions at all about this notice, and please answer the above questions.

Sincerely,

Norm Zada, Ph.D.

Perfect 10, Inc.

800-606-6639

P.O. Box 3398

Beverly Hills, CA 90212

Fax: 310-205-9644

<u>normanz@earthlink.net < mailto:normanz@earthlink.net ></u>

EXHIBIT B

DVD Attached to Perfect 10's March 25, 2009 Letter

Non-Electronic Exhibit

EXHIBIT C



1044 Liberty Park Drive Austin, Texas 78746 512-684-9740 512-684-9741 Fax

April 7, 2009

Perfect 10, Inc. P.O. Box 3398 Beverly Hills, CA, 90212 Tel: 800-606-6639

Fax: 310-205-9644

normanz@earthlink. net

Dear Dr. Zada,

Please help us, to help you, by specifically identifying all of the articles that you wish us to address.

We appreciate you bringing this to our attention. Giganews takes Copyright issues very seriously. Each and every article posted to a Usenet server has its own unique Message ID. We cannot locate any article without the Message ID and therefore Giganews will need the full headers and/or Message-IDs to find the specific infringing material and remove it.

We readily comply with take-down notices that comply with the requirements of the Digital Millennium Copyright Act (the "DMCA"), but the Notice is lacking in the requisite information for a DMCA take down notice which would allow us to remain in compliance with our obligations under DMCA.

Giganews, Inc. provides NNTP based Usenet newsgroups to our customers. We are often confused with web based providers of similar services. Unlike these Web based (HTTP) providers, our Usenet (NNTP) Service does not make articles available over the World Wide Web (HTTP); rather articles are available strictly via the NNTP protocol, which requires our customers to utilize a 3rd party application (e.g. Microsoft Outlook Express, Firefox Thunderbird, Forte Agent, etc.) to access our servers and download articles. These articles are contained in over 110,000 discussion groups called "newsgroups". Further differing from other providers, we neither decode Usenet text articles into binary files, nor transmit or store binary files. In fact, no audio or video files exist on our servers in a directly usable form; rather they are stored in their basic ASCII form.

CasGiganews/ion/Convictors and endough and supported by many court decisions. Accordingly, at take our obligations under the DMC. They seriously, which include:

(i) not modifying the content of material as it is sent, received and stored on our servers at the direction of our customers; (ii) maintaining a system whereby copyright holders can notify Giganews in the event infringing content is located on our servers; and (iii) maintaining a policy of terminating the accounts of subscribers who are repeat infringers.

To assist us in meeting our duties, the "header" of every article posted through our service includes very important information for copyright holders.

Below is a Giganews sample header for your information. For illustrative purposes, we have highlighted in yellow the Message-ID, the X-Trace, and X-DMCA Notifications portions of the header:

```
Path:border1.nntp.dca.giganews.com!border2.nntp.dca.giganews.com!nntp.gigane
 ws.com!backlog2.nntp.dca.giganews.com!news.giganews.com.POSTED!not-for-
 mail
 NNTP-Posting-Date: Thu, 02 Apr 2009 16:04:06 -0500
 From: "Giganews Support" < support@giganews.com>
 Newsgroups: giganews.test
 References: <eeOdndhfE8qazVjUnZ2dnUVZ_t3inZ2d@giganews.com>
 In-Reply-To: <\! eeOdndhfE8qazVjUnZ2dnUVZ\_t3inZ2d@giganews.com >\!
 Subject: Re: testing@Earth.Eagle
 Date: Thu, 2 Apr 2009 23:03:57 +0200
 MIME-Version: 1.0
 Content-Type: text/plain;
     format=flowed:
     charset="iso-8859-1";
     reply-type=original
 Content-Transfer-Encoding: 8bit
X-Priority: 3
X-MSMail-Priority: Normal
X-Newsreader: Microsoft Windows Mail 6.0.6001.18000
X-MimeOLE: Produced By Microsoft MimeOLE V6.0.6001.18049
Message-ID: <vY6dnXkM-qnbtUjUnZ2dnUVZ8sGWnZ2d@giganews.com>
Lines: 7
X-Usenet-Provider: http://www.giganews.com
X-Trace: sv3-
cv7Peryp91V06YfAPM9qQcdR+d0xJ5eww9eO3lJxNHlaXztAuyv6rrTfi0Ix+g9
A81iq7hBMMxhiLgf!qAsatOp4nRoylgu4iZS0TFW2MSEKsmVWlJhITy4N8tur
Y8gAmZmIxGqVRPMF9KdB7HtQdmhCLg==
X-Complaints-To: abuse@giganews.com
X-DMCA-Notifications: http://www.giganews.com/info/dmca.html
X-Abuse-and-DMCA-Info: Please be sure to forward a copy of ALL headers
X-Abuse-and-DMCA-Info: Otherwise we will be unable to process your
complaint properly
X-Postfilter: 1.3.39
Bytes: 1472
X-Original-Bytes: 1429
Xref: number1.nntp.dca.giganews.com giganews.test:21499
```

First, Giganews includes a "Message-ID" as part of the header. All Usenet articles on Giganews' NNTP servers are indexed in the database by the article's Message-ID. The Message-ID is as essential to locating an article on a Newsgroup system.

Second, Giganews includes an X-Trace to identify an infringing Giganews customer. Our "X-Trace" is a 256 bit encryption of our customer's unique ID number along with other pieces of information about the posting.

Third, Giganews includes our DMCA contact information via the "X-DMCA-Notifications" entry which instructs copyright holders how to contact Giganews in the event infringing content is discovered.

We have the equivalent of the entire Library of Congress uploaded to our servers every two days; tens of millions of articles are posted to our Usenet servers on a daily basis. Just as the Social Security Office needs your unique Social Security Number, instead of your name, to find your record among the millions of others, Giganews similarly needs the unique Message-IDs to find the specific infringing material among the not millions, <u>but billions</u>, of articles stored across our Usenet servers

We ask that copyright holders include in their DMCA notice <u>either</u> the full header <u>or</u> the Message-ID of the infringing article (we can derive one from the other). This is important as an article can be posted in any newsgroup regardless of the name on the newsgroup.

Using the Message-ID, we are able to find and delete even those articles cross-posted to newsgroups whose group name is <u>unrelated</u> to the infringing content. We strip the Message-ID from the header, locate and delete the article, while, just as importantly, use the header information to identify if the article was posted by one of our customers. This allows us to identify if a Giganews subscriber posted the infringing material and query our database to determine if the person is a repeat infringer, which we are under a legal duty to do

Giganews' policy upon receiving a DMCA Notice is to delete the article first and then notify the customer. Giganews established this policy at the inception of the DMCA in 1998. Giganews' DMCA policies also define a repeat infringer as a person who has had two separate occurrences of posting an article(s) for which separate DMCA Notices have been received. We call this our "Two Strikes and You're Out" policy. On the second "Strike" we block our subscribers from uploading further infringing material. This very strict cancellation policy has resulted in weeding our infringers from posting on Giganews. The X-Trace provides the only information that allows us to identify our customer. The X-Trace customer information is only contained in the header and failure to supply the Message-ID further means Giganews cannot identify repeat infringers who are our customers. So if the Copyright Holder, or Agent, neglects to supply the Message-ID or the header with X-Trace customer information, Giganews cannot identify and therefore cannot fulfill its legal duty under the DMCA for maintaining a system of cancelling

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repeat offenders. Please, help Giganews, to help you, by supplying Message-IDs or full headers so we can maintain our Repeat offender database.

To help facilitate our DMCA notice process, we have created an <u>automated</u> system to deal with DMCA take down notices. This is because we process a mind boggling amount of data representing <u>tens of millions</u> of unique articles, across an excess of 110,000 separate newsgroups; all processed through our Usenet servers on a <u>daily</u> basis. This translates into more than 3.3 billion articles in our system today. In fact, Giganews, Inc. does not become aware of infringing content until we receive a DMCA notice from a copyright holder (the person who knows better than anyone else that it is in fact a copyrighted work and where it can be found). When received electronically, Giganews can then use automated methods to carry out the steps outlined in the preceding paragraph.

Please, help us, to help you, protect you or your members' copyrights, by always sending electronically the articles' headers and Message-IDs.

We think it is helpful to provide copyright holders an example of how a copyright holder can better understand the NNTP protocol. Several years ago, Sony Music was having difficulty understanding the NNTP protocol. A Usenet Newsgroup Service Provider is technically very different from a HTTP web based Internet Service Provider. We suggested to Sony Music's lawyers that rather than using expensive lawyers, it would be faster and cheaper to use one of the electronic Internet search services that function as Copyright Agents for the Copyright Holder. We then used as an example, not a recommendation, the company Bay TSP. (another such company is Media Sentry) This company, and companies like it, is skilled in massively searching (spidering) Usenet for their clients' copyrighted works, identifying, formatting and sending electronic DMCA Notices attaching the header information or Message-IDs for each article they want Noticed and deleted. This private electronic DMCA Notice method is surgical and results in much faster deletion of infringing articles for both sides and is more efficient than lawyers, paperwork and Courts.

Sony Music hired Bay TSP. This solved the communication issues and Bay TSP sent us multiple Electronic DMCA Notices over the years with the proper header information and we thus were able to promptly delete all their clients' requested articles by Message-ID number. Again, this may be a solution that allows you to help us, help you.

Although we realize the DMCA does not require the use of a 3rd Party Copyright Agent, we thought it would be helpful to forward along the contact information for BayTSP and Media Sentry:

BayTSP PO Box 1314 Los Gatos, CA 95031-1314

Tel: 877.9BAYTSP (877.922.9877)

Media Sentry 4690 Millennium Drive Belcamp, MD 21017

Tel: 410-931-7500 Fax: 410-931-7524

At this time we consider the action required of us under the framework of the DMCA for this Notice to be completed. If there is any further action you believe we should take, or if you have more information for us, please let us know so we can fulfill our obligations under the DMCA.

Regards,

Ron Yokubaitis DMCA Agent

Giganews, Inc

SENDER: COMPLETE THIS SECTION		COMPLETE THIS SECTION ON DELIVERY	
Complete items 1, 2, and 3. Also complet item 4 if Restricted Delivery is desired. Print your name and address on the rever so that we can return the card to you. Attach this card to the back of the mailpie or on the front if space permits. 1. Article Addressed to: Norm Zada, Ph.D. Perfect 10 72 Beverly Park Beverly Hills, CA, 90210-1	se ece,	A. Signature Agent Addressee Addressee Addressee B. Received by (Printed Name) C. Date of Delivery Septiment Septiment No Septiment Septiment C. Date of Delivery Septiment Septiment Agent Agent Addressee Addressee No Septiment Septiment Agent Addressee No Agent Addressee No Septiment Septiment Agent Addressee No Septiment Septiment Agent Addressee No Septiment Septiment Agent Addressee Addr	
2. Article Number (Transfer from service 7005 3	110 0	0000 0885 6600	
PS Form 3811, February 2004 Domestic Return Receipt 102595-02-M-1540			

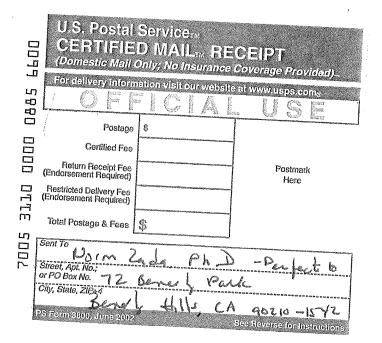


EXHIBIT D

Subject: Infringement

Date: Wed, 11 Aug 2010 20:21:34 -0700

To: dmca2008@giganews.com

From: Norman Z < normanz@earthlink.net>

August 11, 2010

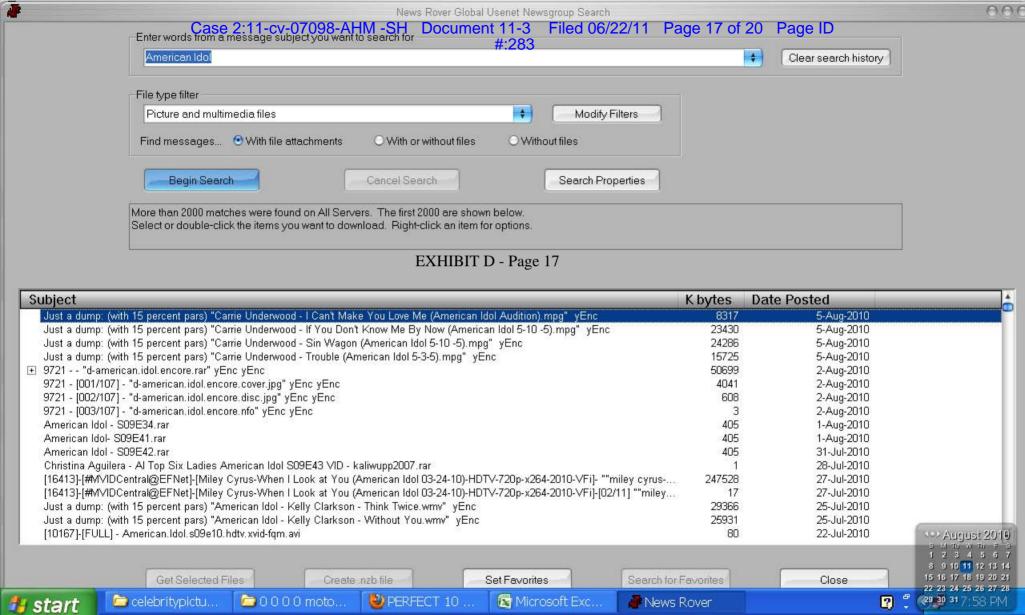
To Giganews.com

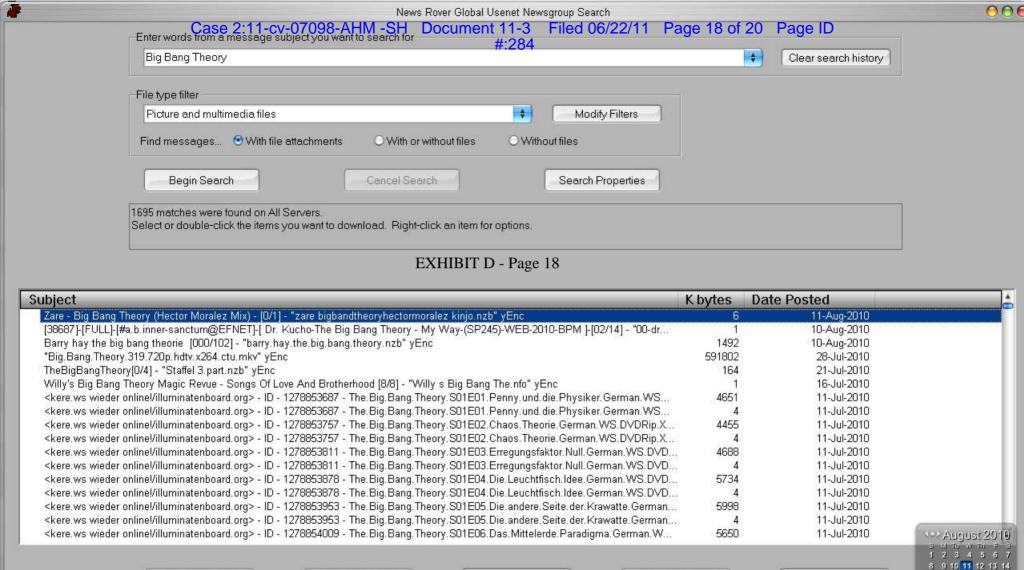
It appears that your company is selling access to large amounts of copyrighted material that you do not have the right to sell. I have attached printscreens of search results showing that your company is offering episodes of the TV shows American Idol, Big Bang Theory, CSI Miami, and How I Met Your Mother. I assume you realize that people have worked hard to create these shows and are entitled to be paid for their work. Your company should not be making copies of, or selling access to such shows, without compensating the rightful owners.

Sincerely,

Norm Zada, Ph.D.

310-205-9988









Get Selected Files



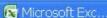






Create inzb file





Set Favorites







Search for Favorites



Close



